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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 721

ANTHONY AND MARY LOU MASTROPOLE,

versus

TRANSIT HOMES, INC. AND LEON TODD OF WHOM TRANSIT HOMES, INC., IS PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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The Petitioner, Transit Homes, Inc., prays that a Writ of Certiorari issue to review the opinion of the South Carolina Supreme Court rendered and filed on June 17, 1970.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court, No. 19068, is as yet unreported. It appears here as Appendix A., p. 13, *infra*.

JURISDICTION

The opinion of the South Carolina Supreme Court on June 17, 1970. Petition for Rehearing was duly filed and was denied on July 7, 1970. This Petition for Certiorari is filed less than ninety (90) days from the date aforesaid. Stay was granted by Justice Thomas P. Bussey of the South Carolina Supreme Court by Order of July 24, 1970, which appears as Appendix B. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

QUESTIONS PRESENTED

This was an action for property damage to a mobile home being transported by Petitioner in interstate commerce from Virginia to South Carolina. The owners were awarded $5,103.00 actual damages and $45,000.00 punitive damages by a jury in the lower court, which was affirmed on appeal by the South Carolina Supreme Court. The questions are as follows:

(1) Should the State Court have applied the applicable Federal Law, specifically the Carmack-Cummins Amendment, 49 U. S. C. Sec. 20 (11) and the Federal decisions with regard to punitive damages?

(2) Was the lower court required to take judicial notice of Federal Statutes?

(3) Should the South Carolina Supreme Court have granted a new trial in order that the case be tried under the applicable Federal Law?

STATUTE INVOLVED

The Carmack-Cummins Amendment, 49 U. S. C. Sec. 20 (11) J. See Appendix C.

STATEMENT OF FACTS

This action was brought in the Court of Common Pleas for Beaufort County, South Carolina. The Plaintiffs alleged that they were the owners of a mobile home valued at $6,500.00 and that Petitioner, Transit Homes, Inc., agreed to transport the mobile home from Stafford, Virginia to Beaufort, South Carolina, under a bill of lading, and took possession of the trailer on July 1, 1968. The trailer was actually delivered on July 29, 1968 in a damaged condition. The Complaint alleged that loss was due to negligence and recklessness of Transit Homes, Inc., its agents or servants, and sought $100,000.00 in actual and punitive damages.

At a conference with the Presiding Judge before commencement of trial, the Plaintiff's Attorney stated: "The case is governed by I. C. C. Laws . . ." Defendant's counsel agreed. (Transcript of Record of Proceedings in Court of Common Pleas for Beaufort County, hereinafter referred to as Transcript) p. 13.

The bill of lading introduced into evidence provided on its face that it was an ICC form and that the property is received "subject to the provisions of the Motor Carriers Act of 1935 and tariffs in effect on date of issue of this receipt."

The Trial Judge ruled that he was not required to take judicial notice of Laws of the United States. (Transcript, p. 285.) The Court did not charge with reference to the Carmack-Cummins Amendment, 49 U. S. C. Sec. 20 (11) and the matter was presented to the jury as a negligence action under the laws of South Carolina, which authorized punitive damages against a corporation on a showing of recklessness, wilfulness and wantonness on the part of an agent. (Transcript, p. 315.)

The issue of the Federal Law with regard to punitive damages was raised on the motion for directed verdict (Transcript, p. 272). The Petitioner did not make any request to charge on the Statute or Federal decisions on punitive damages, but in view of the Court's ruling that the Federal Statute must be "proved" and no evidence on this point had been introduced, such a request would obviously have been useless.

On motion for a new trial (Transcript, p. 345, Grounds 24, 25, 26) Petitioner again urged that the court should have applied the Federal Law, but the Lower Court denied the motion without explanation (Transcript, pp. 346-347).

The issue with regard to the Federal Law was presented to the South Carolina Supreme Court by Petitioner's Exceptions Nos. 3 and 4, which read as follows:

> "(3) That the Court erred in submitting the issue of punitive damages to the jury and in refusing Defendant's Motion for a judgment *non obstante veredicto* as to punitive damages in that the Court failed to apply the applicable Federal Law relating to Interstate Commerce including the 'Carmack-Cummins Amendment', 49 U. S. C. A., Section 20 (11) and the applicable Federal decisions relating to the right to recover punitive damages against a corporation.
>
> "(4) That the Court erred in failing to give full faith and credit to the United States Constitution and Statutes and decisions of the United States Courts in an action for damages to interstate shipment of property, when the Federal question was established by the pleadings and the evidence, and was clearly before the Court." (Transcript, p. 348.)

The South Carolina Supreme Court held that the Carmack-Cummins Amendment should not have been charged:

> "That statute, with certain exceptions, imposes absolute liability on an interstate carrier for loss, damage or injury to property caused by it. Defendant

took the position at the trial that this statutory liability was inapplicable because this action sounded in *tort* and was based upon specific allegations of negligence. Counsel for plaintiffs acquiesced in this view, and the trial judge instructed the jury that the burden was on plaintiffs to prove actionable negligence. To have instructed the jury on the carrier's statutory liability would have been inconsistent with the theory on which the case was tried.

"Furthermore, counsel for defendant responded in the negative when asked at the conclusion of the charge whether there were 'any objections to the instructions or requests for additional instructions,' and no exceptions to the charge have been taken on this appeal." (Opinion, Appendix A, p. 13.)

It is submitteed that the issue with regard to the applicability of Federal Law was raised by the pleadings, discussed with the Court in the pre-trial conference, made manifest by the evidence, presented in the motion for a directed verdict, and in post trial motions to the lower court, and again before the South Carolina Supreme Court.

REASONS FOR GRANTING THE WRIT

This case clearly involved interstate commerce by a regulated carrier and falls squarely under the provisions of the Carmack-Cummins Amendment, 49 U. S. C. A. Sec. 20 (11). It is clear that this statute supersedes any State laws, and "The construction, application and effect of the provisions of acts of Congress relating to the subject present Federal questions with respect to which the decisions of the United States courts are controlling." 14 Am. Jur. (2d), "Carriers", Section 518. See also *Missouri Pacific Railroad Co. v. Elmore and Stahl*, 377 U. S. 134, 84 S. Ct. 1142, 12 L. Ed. (2d) 194 (1964); "the liability of a carrier for damage to an interstate shipment is a matter of Federal Law controlled by Federal statutes and decisions."

The court is the case of *St. Louis Mountain and Southern Railway Co. v. C. A. Starbird*, 37 S. Ct. 462, 243 U. S. 592, 61 L. Ed. 917 (1917) reaffirmed the holding of *Adams v. Crosinger*, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 319 (1913) that the Carmack Amendment "superseded State Law" and held:

> "As the shipment in this case was interstate, there can be no question that since the decision in the *Crosinger* case, *supra*, the parties are held to the responsibilities imposed by the Federal Law, to the *exclusion* of all other rules of obligation." (Emphasis added.)

In *St. Louis Mountain and Southern Railway Co. v. Starbird, supra*, the Supreme Court recognised that, "The alleged right of a Federal character must in some way be drawn to the attention of the State Court so that it may know, or from the nature of the pleadings, be held to have known, that a Federal right was before it for adjudication." However, it pointed out that no particular form was necessary:

> "The Carmack Amendment is a Federal statute regulating Interstate Commerce."
>
> • • •
>
> "Since the passage of the 'Carmack Amendment', the State Court *must be held to have known that interstate shipments were covered by uniform Federal rules* . . . (Emphasis added.)
>
> • • •
>
> "The Federal right is not required to be pleaded in any special or particular form. It is enough that it is relied upon and in a proper manner called to the attention of the court."

The Supreme Court then held that reference to the bill of lading in the answer was sufficient to bring the Federal question to the attention of the court.

The pleadings show the action to be one against the common carrier for damage in an interstate shipment. The

bill of lading was introduced in evidence. The Plaintiffs' attorney agreed that the matter was covered by I. C. C. law and there were frequent references to the bill of lading, tariffs and I. C. C. regulations.

The Defendant did not introduce the Federal statute into "evidence." On the motion for a directed verdict, the court held that it was not required to take judicial notice of statutes of the United States:

> "The only thing that the court would take judicial notice of is the statutes of the State of South Carolina. All other statutes, laws of other states, *laws of the United States, must be properly proved and properly introduced into evidence.*" (Emphasis added.) (Transcript, p. 285.)

This is a clear misconception of the law by the State Judge. The correct rule is stated in 29 Am. Jur. (2d), Evidence, Sec. 32:

> "All courts, federal and state alike, take judicial notice of the provisions of the United States Constitution, and the amendments and the ratification of amendments thereto. Moreover, all courts, federal and state alike, take judicial notice of the public and general acts of Congress. Judicial notice in regard to congressional enactments is not limited to their existence, wording, and interpretation, but extends to all matters connected therewith."

The Court here has awarded $45,000.00 punitive damages against Petitioner. The actual damage found by jury amounted to only $5,103.00, so that the punitive damages are almost nine times the actual.

The South Carolina Supreme Court held that Petitioner's driver owed a duty of a "reasonably diligent inspection" and "the record leaves no doubt that he violated this duty, and the jury could with reason find that he did so wilfully or recklessly." (Opinion, Appendix A, p. 13.)

Regardless of the applicability of Federal Law to the question of actual damages, it is clear that the State court has decided the question of punitive damages under the law of South Carolina and in a way probably not in accord with the applicable decisions of the Supreme Court. The Carmack Amendment provides that a shipper may recover "full actual loss." There is accordingly no provision for punitive damages. The fact that the Federal Rule with regard to punitive damages differs from the South Carolina Rule has been recognized by the South Carolina Supreme Court in an Interstate Commerce case:

> "Since the passage of the Carmack Amendment, it has been pointed out repeatedly by the courts that by this enactment Congress intended to take possession of the field of interstate commerce, and thereby supersede all state laws and regulations with reference to it.
>
> • • •
>
> "It may be that under the facts and inferences which might be drawn therefrom, the lower court would have been justified in submitting this question to the jury if the South Carolina law were applicable.
>
> • • •
>
> "We think it evident from a reading of the instructions given by the trial court to the jury that due effect was not given to the Federal law respecting the right to recover punitive damages in connection with an interstate shipment of merchandise. In fact, the Federal law and the Federal decisions were deemed inapplicable. The case, apparently, was presented to the the jury upon the theory that the law of South Carolina . . . controlled the rights and liabilities of the parties.
>
> • • •
>
> "The Federal rule and the State rule differ materially in respect to the award of punitive damages, the former restricting the right to recover such damages, the latter being without these qualifying restrictions. Therefore, if the Federal law governs, the State law

must yield and being superseded, can have no application. The shipment being interstate. the rights and liability of the parties are controlled and determined solely by the acts of Congress, the shipping receipt which forms the contract between the parties and the common law as administered and interpreted by the Federal courts." *Huddy v. Railway Express Agency, Inc.*, 181 S. C. 508, 188 S. E. 247 (1936).

Here the judge charged the jury on the applicable State law on the question of punitive damages.

This Court should not permit a State court to disregard the Interstate Commerce clause and the applicable Federal statutes. Certainly a State court should not be permitted to refuse to take judicial notice of a statute of the United States directly governing the subject matter of the action.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the South Carolina Supreme Court.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SOUTH CAROLINA SUPREME COURT

BRAILSFORD, A. J.: This action arises out of the transportation by Transit Homes, Inc., a common carrier, of a mobile home, belonging to Marine Corporal and Mrs. Anthony Mastropole, from Stafford, Virgina, to Beaufort, South Carolina. The moble home was damaged en route, and it arrived in Beaufort on July 29, 1968, some twenty-seven days later than expected. The carrier appeals from a verdict and judgment in favor of the Mastropoles for $5,103.00 actual damages and $45,000.00 punitive damages.

The first and second exceptions challenge the sufficiency of the evidence to raise a jury issue as to actionable negligence and willfulness on the part of the carrier. We state the facts in the light of the settled rule that in passing upon these exceptions all conflicts in the evidence must be resolved in plaintiffs' favor, and they are entitled to the benefit of every favorable inference which may reasonably be drawn therefrom.

Upon receiving military orders transferring him to Parris Island, South Carolina, Corporal Mastropole called Transit Homes, Inc. As a result, on June 27, 1968, E. Harvey Ring, Jr., representing the carrier, called upon the Mastropoles at Stafford, Virginia, where they were residing in their mobile home. He inspected the trailer for roadworthiness, advised the Mastropoles about the rates for the company's services, instructed them in detail as to how the trailer and its contents should be prepared and distributed for transportation, referred to in the record as "packing", told them that the driver would inspect to see that this had been properly done, issued a bill of lading for shipment of the trailer beginning on July 1, 1968, and received a deposit of $300.00 against total freight charge of $516.00. An additional charge would have been required if the carrier had undertaken to pack the trailer.

Ring spent about two hours with the Mastropoles. He had available an illustrated "Mobile Home Moving Manual," which had been printed by Transit for the information

of shippers. However, Ring did not show this manual to the Mastropoles nor leave a copy with them. The instructions which he gave them were inconsistent with the manual in at least one significant particular.

The living room of the trailer was expandable by a roll-out section, referred to in the record as the "expando", which had to be retracted for highway transportation. When retracted, this section occupied about three-fourths the width of the trailer. Ring told the Mastropoles that the extra weight of this section should be balanced by placing certain heavy items, *i.e.*, a sofa, chair and combination stereo-tv on the opposite side of the room. The manual stated that "under no circumstances should any items be packed inside" an expandable room. All of Transit's witnesses, including Ring who denied having given inconsistent advice, agreed with the manual and testified that the trouble which developed was caused by excessive weight in this area. These witnesses testified that the sidewalls of a trailer tie it together and support the frame in transit. Since the walls of the roll-out section add weight but furnish no support, the frame is weakest here and will fail under additional weight. The best weight-carrying areas are near the front and over the axles.

Transit dispatched Leon D. Todd, an experienced driver, to haul the mobile home. He met Corporal Mastropole at the trailer park on the morning of July 1. The roll-out section of the living room had been retracted, the trailer had been unblocked, and it had been packed by the owners. Todd inspected the exterior and interior of the trailer and completed a "driver's inspection record" on a form furnished by the company, which was signed by him and by Corporal Mastropole. By his answers to numerous questions, Todd reported that heavy objects had been properly located in center and front of the house trailer, that the trailer did not appear to be overloaded, and, in effect, that it had been properly prepared for transportation. He also told the Mastropoles that "there shouldn't be no problem moving it." On this report as introduced in evidence the words "frame sags" were written under diagrams of the right and left side of the trailer, and the word "buckles"

was written over the top of the left side. Corporal Mastropole denied that these conditions existed and denied that these words appeared on the report when he signed it.

After Todd connected the house trailer to his tractor, the Mastropoles left in their automobile for South Carolina. Todd told them that he would see them there the next morning, but this was not to be.

After Todd had driven about theirty-five miles, he noticed that the house trailer was tilting. He stopped to look for the cause and found that "the frame was giving under it." Todd called Transit's home office in Greenville, South Carolina, and was instructed by Ernest Yeager, the head of the company's claims department, to take the trailer to a repair facility in nearby Ashland, Virginia, for an appraisal of what repairs were needed and an estimate of the cost. Upon complying with the instructions, Todd left the house trailer there.

On the afternoon of July 2 Mastropole called Transit's home office to find out why the trailer had not arrived in Beaufort and was advised of the difficulty. He was also told that he would have to authorize the repairs, at a cost of $300.00, by wire before anything could be done. Mastropole, with apparent reluctance, sent such a telegram at 6:25 P. M. on July 3. This message was automatically transcribed by a Western Union machine in Transit's office. However, the office was closed and did not reopen until Monday, July 8. It was not until then that the Ashland facility was authorized to proceed with the repairs, which were finally completed on July 18.

On the next day, the same Mr. Ring who had first contacted the Mastropoles was dispatched to haul the trailer from Ashland to Beaufort. Ring checked the reenforcement of the right side of the frame, which was the extent of the repair undertaken, and went through the trailer to check the load and its distribution. Apparently satisfied then, although he later testified that the Mastropoles had completely disregarded his instructions in packing the trailer and had badly over-loaded the "expando" area, he hitched the trailer onto his truck and started on his trip. Within a mile or two he noticed that the trailer was leaning to the

right, and he pulled into a truck stop to investigate. When he ascertained by measurement that the trailer was tilting three inche to the right, he notified Mr. Yeager and was instructed to leave it at the truck stop. On the same day, according to Transit's witnesses, Mr. Yeager sent Del Roberts, who was chief of the company's field repairmen, to check the house trailer and determine what needed to be done.

Roberts testified that he arrived at Ashland on the evening of July 19 and that he spent all of the next day inspecting the trailer, taking pictures of it and its contents and studying the problem. At some time before 8:00 A. M. the following Monday, he concluded that the difficulty had been caused by excessive weight in the expanding living room. He also concluded that because of the damage already done, the front of the trailer would not bear its normal share of the load, and that the weight would have to be concentrated over the axles. Soon after 8:00 o'clock, he called Mr. Yeager and told him what he proposed to do and expressed the opinion that the house trailer could be safely moved when this had been accomplished. Roberts testified that it took him untl after business hours on Monday to complete his task. He called Mr. Yeager the next morning, July 23, and told him that the house trailer was fit for transportation.

A driver was dispatched to pick up the trailer on Thursday, July 25. After a stop en route over Saturday and Sunday, it arrived in Beaufort on July 29.

In the meantime, the Mastropoles had been beset by difficulties. Upon their arrival with their two small children, they obtained one small room, with furnishings inadequate for a family of four, at the Hostess House on Parris Island, where accommodations were available to service personnel for a limited number of days only. Most of the family's clothing had been left in the house trailer. The children were uncomfortable and could not sleep at night. As time passed, the Mastropoles became more and more upset and concerned about their mobile home and other belongings, and about the unexpected expenses being incurred. They had over-stayed their time at the Hostess House and were

being urged to leave. Corporal Mastropole made numerous unproductive calls to Transit's home office. According to his testimony, "they weren't very nice on the telephone." When he called after the second breakdown, he was referred to Mr. Yeager. We quote in part Mastropole's testimony concerning this conversation:

> "He said, his exact words were it's one of those things. It's a bad trailer, it's a hoax and it's a jinx. He said forget the whole thing because we are not moving it down there.
>
> "Q. And he refused to move the trailer?
>
> "A. Yes, sir, he said they would not move it. I said well what am I suppose to do now. He said well just let the finance company repossess it, forget the whole thing. I told him it was ridiculous and that's when I obtained counsel."

Shortly after this conversation, Mastropole consulted James H. Moss, Esquire, of the Beaufort Bar, and Mr. Moss made two telephone calls to Mr. Yeager. At the trial, Mr. Yeager flatly denied having told Mastropole or his lawyer that his company was not going to move the trailer to South Carolina. However, he did not state what he did say to them. Neither he nor any other witness for Transit testified that either Mastropole or Mr. Moss was advised that efforts to make the trailer roadworthy were being continued after the July 19 breakdown, or that Mr. Roberts had pronounced it ready for towing on the morning of July 23. By clear inference, no such advice was given prior to July 26, because, following these conversations with Yeager, the Mastropoles, who had been told that they had to leave the Hostess House, rented an unfurnished apartment for $140.00 per month and furnished it on credit. Then, on July 26, Corporal Mastropole drove to Ashland, Virginia, intending to retrieve the family belongings in a U-Haul trailer. Inferentially from the record, when Mastropole learned that the house trailer was en route to South Carolina, either he or his attorney notified Transit that it would not be accepted in its damaged condition, and that Mastropole could not pay the charges because of the expenses he

had incurred by reason of the delay in delivery. By prearrangement, when Transit's driver arrived at Beaufort, he took the trailer to a storage facility. Mastropole testified that when the trailer arrived, it was "leaning way over to one side. It looked . . . like it had been wrecked." He was allowed to inspect the interior of the trailer and, inferentially, to remove the family belongings. He testified that these were in complete disarray, and that the load was distributed directly opposite from the instructions given him by Ring.

The trial judge submitted to the jury only three specifications of negligence and willfulness. The first of these was a general charge of fault in the actual operation of the tractor while towing the house trailer. The second charged fault in the instructions given as to how the mobile home should be prepared for transportation by the owners. The third charged fault in failing to properly inspect and make sure that the trailer was safe for travel.

Transit urges that there was no evidence tending to support the charge of fault in the actual operation of the tractor while engaged in the towing operation. We agree. It further contends that it owed no duty to instruct plaintiffs as to how the trailer should be packed, and none to inspect it afterward. Hence, the case should have been withdrawn from the jury. We disagree.

When the Mastropoles were offered the choice of paying a fee to the carrier for packing the trailer or packing it themselves, the second alternative, which they chose, was not to pack on their own. The carrier offered to instruct and to inspect. When Transit's representative, an expert in the field, undertook to instruct them as to how the trailer should be packed, it was his duty to do so with reasonable care and diligence. There was substantial evidence that he violated this duty to plaintiffs' prejudice.

The Mastropoles were also entitled to the benefit of a reasonably diligent inspection by the initial driver. It was his duty to advise them of any obvious condition likely to result in damage or delay, and to give them an opportunity to correct any significant mistake made by them in packing the trailer. The record leaves no doubt but that he violated

this duty, and the jury could with reason find that he did so willfully or recklessly. The driver testified that he knew from his inspection that the load was improperly distributed with excessive weight in the "expando" area. As an experienced mobile home mover, he knew the hazard involved, especially so if, as he testified, the frame was sagging. However, instead of pointing this out to the owners and giving them the opportunity to correct their mistake, he told them that there should be no problem in transporting the trailer. Then, he added to the inspection report the comment, "Customer responsible for expando room and packing of trailer," and testified, in effect, that he did so in order to insulate himself and his employer from liability if the harm which he chanced should ensue.

The only authority relied upon by Transit in support of its claim that it owed no duty with respect to the packing of the trailer is *South Carolina Asparagus Growers' Ass'n. v. Southern Ry.*, 46 F. (2d) 452 (4th Cir. 1931). While the rationale of this decision does tend to support the carrier's claim, it is opposed by the weight of authority. Annot., 44 A. L. R. (2d) 993, 1000 (1955). We quote the majority rule as stated in American Jurisprudence:

> "It is generally held that a carrier is not to be held responsible for the loss of goods during transit occasioned by imperfect loading on the part of the shipper where that defect was not apparent at the time it accepted the shipment. On the other hand, it is generally held, in the absence of statute and although there are some few cases to the contrary, that if the improper loading is apparent, that is, if it is a fact which addresses itself to the ordinary observation of the carrier, the carrier will be held liable notwithstanding the negligence of the shipper." 14 Am. Jur. (2d), Carriers, Sec. 531 (1964).

Furthermore, the same court which decided the *Asparagus Growers* case embraced the majority rule in *United States v. Savage Truck Line*, 209 F. (2d) 442 (4th Cir. 1953), 44 A. L. R. (2d) 984. We quote from the opinion:

> "When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper . . ." 209 F. (2d) at 445.

The exceptions which challenge the sufficiency of the evidence to sustain the verdict are without merit.

The third exception charges that the court erred in submitting the issue of punitive damages to the jury and in refusing to grant judgment *non obstante veredicto* as to punitive damages, the error being "that the Court failed to apply the applicable Federal Law relating to Interstate Commerce including the 'Carmack-Cummins Amendment', 49 U. S. C. A., Section 20 (11) and the applicable Federal decisions relating to the right to recover punitive damages against a corporation."

This exception raises no issue for determination by us because no motion was made at the trial that the issue of punitive damages be withdrawn from the jury or that a verdict be directed for the defendant as to such damages. The *non obstante* rule may be invoked only when a timely motion has been made at the trial. *Norton v. Ewaskio*, 241 S. C. 557, 129 S. E. (2d) 517 (1963).

We quote the fourth exception:

> "That the Court erred in failing to give full faith and credit to the United States Constitution and Statutes and decisions of the United States Courts in an action for damages to interstate shipment of property, when the Federal question was established by the pleadings and the evidence, and was clearly before the Court."

We are unable to ascertain from this exception what proposition of law or fact the appellant wishes us to review. Thus, the exception does not conform to the requirement of rule 4, section 6 of the rules of this court and raises no issue for determination by us. If, however, as suggested by

the brief, the complaint is that the court failed to charge the Carmack-Cummins Amendment to the Interstate Commerce Act, 49 U. S. C. A., Sec. 20 (11), the point is without merit. The statute, with certain exceptions, imposes absolute liability on an interstate carrier for loss, damage or injury to property caused by it. Defendant took the position at the trial that this statutory liability was inapplicable because this action sounded in *tort* and was based upon specific allegations of negligence. Counsel for plaintiffs acquiesced in this view, and the trial judge instructed the jury that the burden was on plaintiffs to prove actionable negligence. To have instructed the jury on the carrier's statutory liability would have been inconsistent with the theory on which the case was tried.

Furthermore, counsel for defendant responded in the negative when asked at the conclusion of the charge whether there were "any objections to the instructions or requests for additional instructions," and no exceptions to the charge have been taken on this appeal.[1]

The two remaining exceptions, 5 and 6, charge that the court erred in failing to grant a new trial absolute because the verdict for punitive damages was so excessive as to show prejudice, etc., or in failing to grant a new trial *nisi* because of undue liberality on the part of the jury. These exceptions have been abandoned by the failure of counsel to argue them in the brief, and need not be considered.

The following additional points have been argued in the third subdivision of the brief as though raised by exceptions 5 and 6.

1. The motion for judgment *non obstante veredicto* as to punitive damages should have been granted because punitive damages are not recoverable from a carrier for loss or damage to property in interstate transportation.

2. If such damages are recoverable, their allowance is subject to the "Federal rule that punitive damages cannot be awarded against a corporation unless there was participation or ratification by an officer or supervisory official of the company."

---

[1] Counsel for Transit on this appeal were retained after the trial.

3. Recovery against the carrier could not exceed the released value of the property being transported as stated in the bill of lading, *i.e.*, $7,500.00.

These questions are not properly before us because they were not raised in the trial court and, except for point 1, have not been raised by any exception on this appeal. Point 1 is without merit for the reason stated in overruling exception 3.

Affirmed.

MOSS, C. J., LEWIS, BUSSEY and LITTLEJOHN, JJ., concur.

APPENDIX B

ORDER OF JUSTICE THOMAS P. BUSSEY

On consideration of the Petition of Appelant, Transit Homes, Inc., for a stay of execution in this cause, pending a Petition to the Supreme Court of the United States for a Writ of Certiorari, and it appearing that Petitioner has filed herewith a Supersedeas Bond in the sum of Seventy-Five Thousand and no/100 Dollars ($75,000.00), puruant to Title 28 U. S. C. A., Section 2101, it is,

Ordered, adjudged and decreed that execution on the judgment in the above matter be, and it hereby is, stayed, and the Clerk of this Court is directed to recall the Remititur to the Court of Common Pleas for the County of Beaufort, S. C. until ten (10) days after the United States Supreme Court shall have denied the Petition for Writ of Certiorari or if the Writ shall be granted, until ten (10) days after final determination of this matter adversely to Appellant, Transit Homes, Inc., in the United States Supreme Court.

/s/ THOS. P. BUSSEY,
Justice, Supreme Court of
South Carolina.

Charleston, S. C.
July 24th, 1970.

APPENDIX C

CARMACK-CUMMINS AMENDMENT, 49 U. S. C. Sec. 20 (11)

Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when

transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pusuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock"

shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this pargraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided. Feb. 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; June 29, 1906, c. 3591 § 7, 34 Stat. 593; Mar. 4, 1915, c. 176, § 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208, 46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13(b), 54 Stat. 919.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 721

ANTHONY AND MARY LOU MASTROPOLE,

versus

TRANSIT HOMES, INC., AND LEON TODD, OF WHOM TRANSIT HOMES, INC., IS PETITIONER

ANSWER OF RESPONDENTS

JAMES H. MOSS,
DONALD A. FANNING,
811 Bay Street,
Beaufort, S. C.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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ANSWER OF RESPONDENTS

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

The Respondents, Anthony and Mary Lou Mastropole, respectfully submit the enclosed Brief and request that said Petition for Certiorari be denied.

JURISDICTION

The jurisdiction of this Court is allegedly invoked under Section 28 U. S. C., Sec. 1257 (3) and must further

comply with Revised Rule 19 of The Supreme Court of The United States.

QUESTION PRESENTED

This was an action for property damage to a mobile home transported by Petitioner in interstate commerce from Virginia to South Carolina. The owners were awarded $5,103.00 actual damages and $45,000.00 punitive damages by the jury in the lower court, which was affirmed on appeal by the South Carolina Supreme Court. The question for this Court is as follows:

(1) Did the Petitioner properly raise the Federal Statutes and Federal Law which he now wishes to rely on and the Federal Decisions with regard to punitive damages in the State proceeding?

STATEMENT OF FACTS

This is an action arising out of tort allegedly sustained by the Respondents herein as a result of damage to their mobile home and further damages resulting from the unreasonable delay of Transit Homes, Inc., in transporting the mobile home to Beaufort, South Carolina from Paradise Estates at Stafford, Virginia.

Previous to the trying of the case, the Defendants made certain motions, one of which was that the parties agree that this to be a tort action, which motion was consented to by the Plaintiffs and so agreed by counsel and was the theory upon which the case was tried (Trial Transcript, 13, f. 50, 14 f. 53). It appeared that the Defendants desired that the Plaintiff be put to the greater degree of proof by requiring the Plaintiff to proceed in tort (Trial Transcript, 14 f. 52).

At the conclusion of the testimony, the Appellant moved for a directed verdict, which verdict was granted as

to several allegations of the Plaintiff's Complaint, but at no time did the Appellant ask for a directed verdict as to punitive damages or request the Court to charge the Carmack-Cummins Amendment, 49 U. S. C., Section 20(11). The issues to be submitted to the jury were only those of tort which was the theory on which the case was tried and the Appellant took no exceptions and, in fact, had no further request to charge (Transcript, Page 315, f. 1259).

The Petitioner indicates that the issue for punitive damages was raised on the motion for directed verdict and refers to Transcript, Page 272. I beg reference at this time to Page 272, as Page 272 indicates that no issue of Federal Law or issue as to punitive damages was raised (Petitioner's Petition, Page 4, Paragraph I of Petition; Transcript Page 272).

Only at the termination of the trial of the case and after the jury had rendered its verdict, and approximately a month after the Petitioner had time to prepare lengthy motions for new trial and Judgment *Non Obstante Veredicto* did the Petitioner seek to raise the issues it now seeks to have this Court consider as Exceptions No. 3 and 4 of its original Motion. State of South Carolina Supreme Court thereafter held that "this exception raises no issue for determination by us because no motion was made at the trial that the issue of punitive damages be withdrawn from the jury or that a verdict be directed for the Defendant as to such damages. The *non obstante* rule may be revoked only when a timely motion has been made at the trial." Appendix A, Page 20. It is submitted that no substantial Federal question was raised by the pleadings or otherwise until after the verdict by the jury and that this Court should not exercise jurisdiction in this matter.

REASONS FOR DENYING WRIT

The Petitioners now wish to raise a Federal question when no Federal question was properly raised at the trial of the case and the case was tried on the theory of tort, putting the Plaintiffs to the greater burden of proof, as stated in the case of *Whitney v. California*, 274 U. S. 357 (1927):

> "Specific Federal questions must be properly raised and presented in the State proceeding in accordance with the rules and pleadings of procedure in that state."

The defendants in this case never made the motion for a directed verdict as to punitive damages or any motion based on Federal law upon which it intended to rely. Section 5, Am. Jur. (2d), Sections 545 through 552 set forth the general rule concerning appeal and error. The general rule is best stated as follows:

> "That questions, in order to be available on appeal or review, must be raised and reserved in the lower court and that the higher court can consider the case only on the theory of the parties in the lower court." Am. Jur. (2d), Section 545 through 552.

In the case of *Gray v. St. Louis-San Francisco Railway Company*, 1926, 243 Pacific 1050, 120 Kansas 427, Certiori Denied, 47 S. Ct. 107; 273 U. S. 714; 71 Law Ed., 854, the Plaintiff sued under Section 20-11 for damages to goods in shipment but relief on the Common Law Rule for damages at the trial and on appeal and it was held that Plaintiff may not, on petition for rehearing, ask for a reversal to base his damages on Section 20-11. Although this rule was applied to the Plaintiff, the same rule should apply to the Defendants in this action.

CONCLUSION

For these reasons, the Writ of Certiorari should be denied.

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